

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company (U39E) for Approval of 2008 Long-Term Request for Offer Results and for Adoption of Cost Recovery and Ratemaking Mechanisms

A.09-09-021  
(Filed September 29, 2009)

**RESPONSE OF THE DIVISION OF RATEPAYER ADVOCATES TO  
PACIFIC GAS AND ELECTRIC COMPANY'S PETITION FOR  
MODIFICATION OF DECISION 10-07-045**

**(REDACTED VERSION)**

**I. INTRODUCTION**

The Division of Ratepayer Advocates (DRA) submits the following response to Pacific Gas and Electric Company's (PG&E) Petition for Modification of Decision (D.) 10-07-045, which denied PG&E's application for approval of the Oakley Generating Station ("Oakley Project"). In denying the Oakley Project, the Commission found that PG&E's new resource procurement far exceeded its service area need and directed PG&E to file a new application for the Oakley Project if circumstances change to support reconsideration of the project.

DRA opposes this PFM because it was filed in deliberate disregard of the Commission's express directive that PG&E submit an application for the Oakley Project *if circumstances change* to support the project. The PFM fails to state any changed circumstance, and instead refers to a future contractual promise that may or may not be met. Because PG&E does not provide the requisite justification for the relief it is requesting (pursuant to the Commission's Rules of Practice and Procedure, Rule 16.4) the

PFM is frivolous. It is simply another attempt by PG&E to cut corners and circumvent established procedure for the sole purpose of expediting an unneeded rate based project for the benefit of shareholders, rather than working on addressing the ratepayer needs in its service territory.

## II. THE PFM IS FRIVOLOUS

PG&E's PFM for the modification of D.10-07-045 is frivolous and a deliberate disregard of the Commission's directive that PG&E file a new application for the Oakley Project. The PFM contravenes D.10-07-045, which directed PG&E to resubmit the Oakley Project "via application" when PG&E has met certain conditions. These conditions were stated as follows:

...PG&E may resubmit the Oakley Project, **via application**, for Commission consideration under the specific conditions below. All of these conditions are contingent on PG&E being able to demonstrate that the Oakley Project has received the necessary permits as evidence that future delays or obstacles for this project are minimized. Prior to the next PG&E LTRFO the conditions under which PG&E may resubmit the Oakley Project are if: [Emphasis added.]

- 1) Another approved project or project fail, creating an open need such that the total capacity of all projects approved in this decision, other decisions approving capacity that the Commission determines should be counted towards PG&E authorized procurement, and the total net capacity difference do not sum to greater than the midpoint of the total range, currently 1128 MW,
- 2) If PG&E is able to retire on OTC plant (other than Contra Costa 6 & 7) of comparable size, at least 3 years ahead of schedule, or
- 3) If the final results from the CAISO Renewable Integration Study demonstrates that, even with the projects approved by the Commission, there are significant negative reliability risks from integrating a 33% Renewable Portfolio Standard.

(D.10-07-045, pp. 40-41 (Section 3.5.6) footnotes omitted.)

PG&E has not met any of these conditions for resubmitting the Oakley Project, but has simply created a condition for itself separate from what the Commission directed by claiming that a change in the guaranteed commercial availability date from June 4, 2014 to June 1, 2016 constitutes a change in circumstance sufficient for modification of the decision. This PFM is a rather brazen disregard of a Commission decision. It not only dispenses with the Commission's prerogative for resubmitting the Oakley project via application by striking it, but gives the Commission a set of new conditions for the Commission to meet<sup>1</sup>. Thus, it calls to question what PG&E hopes to achieve by biting the hand that feeds it.

The Commission should examine this PFM first for frivolity and dismiss it on the Commission's own motion. This would further preserve the integrity of the decisions in A.09-10-022 and A.09-10-034, which authorized the GWF Tracy and Calpine Los Esteros Critical Energy Facility (LECEF) projects, because those decisions were contingent on the denial of the Oakley Project.

### **III. D.10-07-045 REQUIRED PG&E TO RESUBMIT THE OAKLEY PROJECT AS AN APPLICATION BECAUSE THE PROJECT CANNOT BE LEGALLY APPROVED BY MODIFYING D.10-07-045**

A PFM cannot legally modify D.10-07-045 to approve Oakley because the decision's denial of the Oakley Project created a vested right in GWF Tracy and the LECEF projects. It is axiomatic that governmental entities may not interfere with vested contractual rights. In D.10-07-042, the Commission held that PG&E may proceed with the development of the GWF Tracy and Calpine LECEF projects, if the Oakley Project is

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<sup>1</sup> The Utility Reform Network (TURN) Notice of Ex parte Communication, August 30, 2010, pp. 1-2. Reflects almost all ratepayer advocates' consternation with PG&E's approach to resubmitting this project. It stated;

Mr. Florio opined that PG&E has an insatiable appetite for increased rate base, and would say or do anything to secure approval for a major new infrastructure investment, whether it is needed or not. Mr. Florio said that approval of the petition would reward PG&E's bad behavior in this proceeding, and concluded by stating that the Commission's credibility would be damaged by such an abrupt reversal of a decision that had been rendered after lengthy deliberation.

denied in D.10-07-045.<sup>2</sup> Therefore, when the Commission denied the Oakley Project, the rights of the counter parties in GWF Tracy and Calpine LECEF to develop their new projects vested in them and remained free of interference by the Commission. PG&E may argue that because an Application for Rehearing is currently pending in A.09-10-022 and A.09-10-034, the approval in those contracts have not been fully vested. This argument may well be true, but it is irrelevant to whether a PFM in this proceeding can modify D.10-07-045 to affect the issues in D.10-07-042. Since the time for rehearing on D.10-07-045 has long since passed, the decision is final insofar as it vested the rights of the GWF Tracy and Calpine LECEF, to the condition precedent set forth therein. The rights in those cases can only be affected by the activities in those proceedings, such as the Application for Rehearing, not by any action the Commission may take in this proceeding.

Also, the Commission required PG&E to resubmit the Oakley Project “via application” because D.10-07-045 involved four projects including the Oakley Project, and the only vehicle for reconsidering one of the four projects without changing or affecting the underlying rationales and decision for the other three projects is by a separate application. In Section 3.4.8 of the decision, the Commission stated one rationale for determining the total number of megawatts that PG&E would be allowed to procure through its LTRFO, then worked backwards to determine which projects should count towards this megawatt number. The projects involved in D.10-07-045 were: 1) The Marsh Landing PPA; 2) The Contra Costa 6 & 7 PPA; 3) The Oakley PSA, and 3) The Midway Sunset PPA.

Regarding these projects, D.10-07-045, the Commission stated:

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<sup>2</sup> D.10-07-042, p. 56. “Based on the above findings, we conclude that PG&E should not proceed with the Tracy Transaction and the LECEF Transaction until PG&E has an unfilled need for new fossil capacity authorized by D.07 12 052 or subsequent decisions. This could occur under two scenarios. First, PG&E’s request for approval of the proposed Marsh Landing Project and/or Oakley Project could be denied in A.09 09-021. Under this scenario, PG&E shall proceed immediately with the Tracy Transaction and the LECEF Transaction, which are “ready to go.”

...we believe it is most appropriate to only allow PG&E to procure resources at the lower end of the range established in D.07-12-052. However, because we also find merit in PG&E's assertions in Section 3.4.6 and 3.4.7 herein, rather than limit PG&E's procurement to the bottom of the range established in D.07-12-052, we determine that PG&E should procure between 950 – 1000 MW of new generation resources.

(D.10-07-045, p. 33.)

If the Commission approves the Oakley Project through this PFM, the Commission would exceed the 950 – 1000 MW of new generation resources that D.10-07-045 limited PG&E's procurement to, without addressing the underlying basis for that limit or the authority for exceeding it. Further, PG&E would then exceed the need authorized in D.07-12-052, which the Commission recognized as establishing the only authority PG&E had for procuring new resources for its service territory.

Ultimately, PG&E fails to identify any authority that allows it to procure MW in excess of those allotted in its LTPP. We agree with DRA that the LTPP was the appropriate legal authority that PG&E had to solicit new resources in 2008 and that this authority was based on Public Utilities Code Section 454.5 which sets forth the LTPP process. As a general rule, to support decisional consistency and discourage the parsing of projects into different applications as a means to circumvent our rulings, to the extent that procurement is allowed outside of the proceeding to approve the agreements that are within the utility's previously authorized procurement authority, any approved MW should be counted against the authorized procurement.

(D.10-07-045, p. 15.)

#### **IV. THIS PTM CONSTITUTES RELITIGATING PG&E'S APPROVED NEED AS DETERMINED IN D.07-12-052**

PG&E is relitigating the need determination for its service territory with this PFM because the request for Commission approval of the 658 MW Oakley Project would exceed the procurement authority granted in D.07-12-052. Ordering Paragraph 5 of D.10-07-045 specified that PG&E is further authorized to procure between 231 - 281

megawatts of new generation pursuant to the authority granted it in Decision 07-12-052. Commission policy is to not second guess previously litigated need determinations absent evidence of significant errors. (D.06-11-048 at p. 10.) The PFM has not argued any evidence of significant errors but rather claims only a minor contract modification. Since Commission policy is to not relitigate need determinations, PG&E's PFM should be denied.

If the Commission decides that through the instant PTM or application that PG&E's approved need from D.07-12-052 is to be relitigated or second guessed, then the Commission should re-examine all of the assumptions that formed the D.07-12-052 need determination. The Commission's order that PG&E file an application when resubmitting the Oakley Project should have made it clear to PG&E that the process for reviewing the resubmitted Oakley Project must afford parties the opportunity to cross examine PG&E and vet its purported changes in circumstances in order to ensure that the "new" Oakley Project meets the parameters established in both D.07-12-052 and D.10-07-045. Rather than follow the Commission's directive and afford parties the opportunity to vet its claims, PG&E chose to cut corners by filing a PFM to remove language from the decision that directs it to file an application in the first place.

## **V. THE PFM'S PURPORTED CHANGED CIRCUMSTANCE HAS NO MERIT**

The PFM should be denied because it is bereft of any evidentiary support from the record to justify the requested modifications. A PFM must state the justification for the requested relief, factual allegations must be supported with specific citations to the record in the proceeding or to matters that may be officially noticed, and allegations of new or changed facts must be supported by an appropriate declaration or affidavit<sup>3</sup>. While PG&E argues that a modification to the Purchase and Sale Agreement (PSA) to extend the guaranteed commercial availability date from June 1, 2014 to June 1, 2016 constitutes a new or changed fact, the fact is there is no XXXXXXXXXXXX on-line date for the

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<sup>3</sup> See Commission Rules of Practice and Procedure, Rule 16.4(b).

Oakley Project. In the PFM, PG&E misleads the Commission by claiming that a 2-year extension of the guaranteed commercial availability date equates to a 2-year delay in the on-line date of the power plant, but it doesn't.<sup>4</sup> PG&E admits that

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XXX<sup>5</sup>. Specifically, in a response to DRA's data request PG&E admits:

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Therefore, this changed fact that PG&E provides should be afforded no weight by the Commission. Given that this is the only purported new fact that PG&E brings forward since D.10-07-045 was approved in July 2010, there is clearly no support for approval of PG&E's PFM. Certainly this minor contract amendment alone does not warrant the Commission approval of a \$1.5 billion rate based power plant. *Thus, PG&E has essentially presented the same application the Commission denied for the Oakley Project with a different XXXXXXXXXX delivery date, but no change in present circumstance.*

## **VI. THERE IS NO EVIDENCE IN THE RECORD THAT OAKLEY IS NEEDED IN 2016**

In the PFM, PG&E implies that there will a need for the Oakley Project in 2016, but there is no evidence in the record that the 658 MW Oakley Project will be needed by the commercially available online date of June 1, 2016. PG&E is sitting on a 40%

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<sup>4</sup> TURN Notice of Ex parte Communication, August 30, 2010, p. 1. "It is not clear from the petition that the online date for Oakley would actually be delayed until as late as 2016, and it might in fact go into service much sooner than that."

<sup>5</sup> Confidential PG&E Response to DRA Data Request, DRA\_007-02, September 13, 2010 (Attached as Confidential Appendix A)

reserve margin<sup>6</sup> and that does not even include the Commission approved new generation of Marsh Landing (719 MW), Russell City (579 MW), Mariposa (184 MW), GWF Tracey (145 MW), and Los Esteros (106 MW). PG&E's authorized need for new resources have been satisfied, and PG&E is in the middle of a new long-term procurement planning proceeding (LTPP). There is no need to consider this project at this time.

PG&E's ability to bring a PFM in less than thirty days after D.10-07-045 was issued is also a strong indication that there has been no real change in circumstance to support the PFM. As one of the conditions for resubmitting the Oakley Project, the Commission required PG&E to "demonstrate that the Oakley Project has received the necessary permits as evidence that future delays or obstacles for this project are minimized." (D.10-07-45, p. 40.) PG&E has not provided the necessary permits showing the later construction and on-line date, much less any permits, as evidence in the PFM.

## **VII. CONCLUSION**

DRA recommends that the Commission deny this PFM and direct PG&E to file an application to resubmit the Oakley Project when PG&E has met all the conditions set forth in D.10-07-045.

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<sup>6</sup> California ISO 2010 Summer Loads and Resources Operations Preparedness Assessment, May 10, 2010, Table 1, p. 4. Planning Reserve calculation shows NP-26 with a 38.5% Planning Reserve for Summer 2010, see also CEC Report, Summer 2010 Electricity Supply and Demand Outlook, CEC-200-2010-003-SD, May 2010; Table 4: NP 26 California ISO 2010 Summer Outlook (MW) shows the Reserve Margin to range from 30 to 45% in the months of June through September, 2010.



Respectfully submitted,

/s/ CHARLYN HOOK for

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September 22, 2010

**APPENDIX A**  
**CONFIDENTIAL**

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of **RESPONSE OF THE DIVISION OF RATEPAYER ADVOCATES TO PACIFIC GAS AND ELECTRIC COMPANY'S PETITION FOR MODIFICATION OF DECISION 10-07-045 REDACTED VERSION** in **A.09-09-021** by using the following service:

☒ **E-Mail Service:** sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

☐ **U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on **September 22, 2010** at San Francisco, California.

/s/ JAIME VADO  
Jaime Vado

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